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In The

Supreme Court Of The United States

OCTOBER TERM 1958

PEARL HOLEMAN, Administratrix of the Estate of Floyd Holeman, ... *Petitioner*

V.

LOUISVILLE & NASHVILLE R. R. Co. . . . *Respondent*

and

PEARL HOLEMAN . . . . . *Petitioner*

V.

LOUISVILLE & NASHVILLE R. R. Co. . . . *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Opinion of The Court of Appeals of Kentucky.

In The

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OCTOBER TERM 1958

PEARL HOLEMAN, Administratrix of the Estate of Floyd Holeman, ... *Petitioner*

V.

LOUISVILLE & NASHVILLE R. R. Co. . . . *Respondent*

and

PEARL HOLEMAN . . . . . *Petitioner*

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LOUISVILLE & NASHVILLE R. R. Co. . . . *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petition of Pearl Holeman individually and as administratrix of the estate of Floyd Holeman, deceased, respectfully shows:

THE OPINION BELOW

The opinion of the Court of Appeals of Kentucky was delivered October 3, 1958, and the Petition for Rehearing was overruled on January 16, 1959. The opinion is reported in 319 S. W. 2nd. 47, and a copy thereof is appended hereto.

JURISDICTION OF THE COURT

Jurisdiction of the Court is invoked under the provisions of 28 U. S. C. A. 1257 (3).

THE QUESTION PRESENTED FOR REVIEW

(a) Were the passes issued to the decedent Floyd Holeman and his wife Pearl Holeman "mere gratuities" or "matters of charity" within the provisions of the Hepburn Act 49 U. S. C. A. 1 (7).

(b) Were the waiver of liability provisions which were printed on the passes valid under the facts of this case.

(c) Should the Court follow the rule announced in the majority opinion in Francis v. Southern Pacific Co. (1948) 333 U. S. 444, 92 L. Ed. 798, to the effect that federal law controls the validity of waiver provisions on free passes or should the Court now adopt the view expressed in the minority opinion in that case, that since Erie R. Co. v. Tomkins 304 U. S. 64, the question is one of state law.

These questions were raised in the trial court by respondent's motion for a directed verdict. The questions were raised by Petitioner's brief in the Appellate Court and were determined adversely to Petitioner in both instances.

STATEMENT OF THE CASE

Floyd Holeman was killed and Pearl Holeman sustained permanent injuries as a result of the derailment of L. & N. passenger train No. 98 near Nashville, Tennessee, on July 3, 1954.

Mr. and Mrs. Holeman were interstate passengers northbound from New Orleans to Louisville, each traveling on a pass which contained a waiver of liability: "The person accepting and using it thereby assumes all risk of accident to person or property . . . "

Pearl Holeman, individually, and as administratrix of her husband's estate brought separate actions in the Jefferson Circuit Court against the Louisville & Nashville R. R. Co. The cases were consolidated for trial as they were on appeal. At the conclusion of the evidence, counsel for defendant, relying altogether on the validity and application of the waiver, moved for directed verdicts. The motion was sustained and judgment was entered dismissing the complaints.

The Court of Appeals of Kentucky, considering the same question, affirmed the trial court. A petition for rehearing was overruled and a mandate was issued.

Floyd Holeman was employed in the auditing department of the Louisville & Nashville R. R. Co. for more than 29 years. He worked and lived during that time in Louisville, Kentucky. In March 1954 he was temporarily and indefinitely assigned to New Orleans, La. The municipally owned New Orleans Union Terminal Co. was then completing a new passenger station to be jointly used and operated by the L & N R. R. Co. and five other lines under a rental agreement between the city and the carriers. The Terminal Company required the services of several experienced accountants in the preparation of necessary reports to the Interstate Commerce Commission and each of the participating carriers furnished two men. Holeman and Walter Weber were sent from the L & N.

These men were kept on the payroll of L & N and their seniority rights were thus protected. Floyd Holeman was promoted from senior accountant to "traveling auditor",

with an increase in salary. His traveling expenses to and from New Orleans, taxi fares, meals, tips and living expenses while living in New Orleans were paid by L & N. It was understood that he might return to his home in Louisville from time to time during his New Orleans assignment and expenses incurred on these trips were paid. Expenses were not paid for days spent in Louisville.

The expenses actually paid included those incurred on a trip to Louisville in May 1954 and expenses incurred on the fatal trip, including his breakfast purchased on the L & N diner on the morning of July 3, 1954. The New Orleans Terminal Company reimbursed L & N for all salary and expenses paid to Floyd Holeman.

In consideration of his advancement to traveling auditor and assignment to New Orleans, L & N requested an annual pullman pass for Holeman. This pullman pass, especially procured for trips between New Orleans and Louisville, was used by Holeman in connection with an L & N "system pass". This pass and the pass held by Mrs. Holeman were service passes earned by Holeman by reason of his long service with L & N.

These service passes were issued by L & N pursuant to a definite, long established and well known policy of the company. Under this policy, employees with six months service were entitled to "trip passes". Five years service earned a "division pass", ten years, a "system pass", fifteen years, a "joint system pass" for husband and wife. Twenty years earned separate "system passes" for husband and wife. It was necessarily conceded that the system passes held by Mr. and Mrs. Holeman were issued in consideration of more than twenty years service to L & N. (Clarence Burkle - pp. 33-63 - question and answer 20).

Mrs. Holeman was not traveling on a pullman pass but on a half fare order. She paid half pullman fare, a part of

which, under the contract between L & N and the Pullman Company, was either paid to L & N, or reduced to that extent the amount of the pullman company operating deficit which L & N was required to assume.

ARGUMENT

The Court of Appeals of Kentucky was bound by the rule most recently reiterated in the majority opinion in Francis v. Southern Pacific Co. (1948) 333 U. S. 444, 92 L. Ed. 798. This Court is not so restricted.

The dissenting opinion in Francis, written by Justice Black with the concurrence of Justices Murphy and Rutledge, strongly attacks the theory under which the federal law is held to control the validity of waiver provisions on free passes. The dissent reviews Charlestown & W. C. Ry. Co. v. Thompson 234 U. S. 576, and Kansas City R. Co. v. VanZant 260 U. S. 459, and points out that both rest on the doubtful authority of Northern Pac. R. Co. v. Adams 192 U. S. 440, which held that federal courts, in passing upon questions of state law in the absence of controlling state legislation or constitutional provisions could declare the "general commercial law" of a state — a doctrine repudiated in 1938 in Erie R. Co. v. Tomkins 304 U. S. 64.

Section 196 of the Constitution of Kentucky prohibits a common carrier from contracting away its common law liability. The majority opinion in Francis in applying the pre Erie-Tomkins transcendental law rule, in addition to neutralizing in part the Erie-Tomkins decision, actually leaves standing a rule under the repudiated Swift-Tyson doctrine, which had fallen so far as Kentucky was concerned because of the constitutional provision prohibiting contractual waiver of liability.

We will not belabor the conflicting views expressed in the majority and dissenting opinions in Francis. The dissenting opinion ably expresses the reasons why it should

now become the prevailing rule. However, even if the Court should conclude that the majority opinion in Francis should stand, we insist that the passes involved in this case were not gratuitious and the waiver of liability provisions were invalid in any event.

I

The Passes Here Were Not "Matters of Charity" or "Mere Gratuities".

The fact that a pass is issued by the carrier without the payment of fare does not make it a free pass. So long as the carrier receives any consideration, direct or indirect, actual or anticipated, from the carriage of the passenger the pass is not free in the sense that the Courts will enforce the waiver of liability provision. New York C. R. v. Lockwood 17 Wall (U. S.) 357, 21 L. Ed. 627; Grand Trunk Ry. Co. v. Stevens 95 U. S. 655, 25 L. Ed. 535; Norfolk Sou. R. Co. v. Chatman 244 U. S. 276, 61 L. Ed. 1131.

Lockwood and Stevens were decided before the passage of the Hepburn Act but the Court in Chatman said: "The settled rule of policy established by the Lockwood case and the decisions following it must be considered unmodified by the Act to Regulate Commerce".

The question necessarily arises as to what constitutes consideration for the passes in this case. One answer is that the passes were earned by Holeman by more than twenty years of service to the railroad.

In Martin v. Greyhound Corp. (1955) [illegible] 2nd. 501, an employee and his wife riding on passes issued pursuant to the terms of a union contract were held to be passengers for hire. There Martin, a Greyhound employee, received trip passes for himself and his wife under the terms of a union contract with the Company. His wife was fatally injured and his suit was dismissed upon a holding that the passes

were gratuities, so that the stipulations against liability were valid. The case was reversed and remanded, the Court of Appeals for the Sixth Circuit writing in part:

> "The union agreement with Grephound provided that its members were entitled to receive trip passes for themselves and their families for such trips as seemed reasonable to the company . . . The obligation of the appellee was fixed by its union contract. The passes were in a real sense part of the compensation paid to appellant as member of the union . . .
>
> "That case (Charleston & S. C. R. Co. v. Thompson, supra) must, however, be considered in the light of its specific facts, the courts rationalization in respect to them, and whether in actuality, as in name, the pass is free . . .
>
> "The problem, as here presented, arises in an era of social, economic, and legal change which has mitigated harsh technical defenses to suits for recovery for negligent injury, has given new values to employee benefits, and new sanctions to their denials. Like all other so-called 'fringe benefits,' including hours and conditions of work, social security, paid vacations, hospitalization, etc., the issue of passes is also subject to collective bargaining, and, like other benefits, is a thing of value, subject no doubt to the revenue laws when received . . . Such climate should and has conditioned interpretation when interpretation is reasonably indicated to effectuate the Congressional purpose.
>
> "The issue as to whether the appellant and his wife were "passengers for hire" is to be resolved by federal and not by state law. It is not of any importance that the appellant's wife was not an employee of Greyhound, if the passes were not gratuitous."

The respondent attempts to distinguish the present actions because it is insisted the Martin case turns on a written agreement. But is this the spirit of the Court's interpretation? Does it not turn on whether the employee was entitled to the passes, quid pro quo? And can it be

reasonably argued that a contract in writing is the only foundation for such a right?

Floyd Holeman was not represented by a union. He had no written contract with L & N. His conditions of employment, hours, salary, seniority status, retirement plan, vacations - - all these and more were determined by established company policies, amounting to promises upon which Holeman was entitled to rely. So it was that he was entitled to receive, after twenty years of service, two system passes, one for himself and one for his wife. Where, then, is there any real distinction between his right and that considered by the Court in Martin.

A further consideration for the pass to Floyd Holeman is the fact that L & N, upon his assignment to New Orleans, assumed the obligation of paying his traveling expenses to and from New Orleans and his living expenses while there.

Certainly if he had been killed while enroute to New Orleans initially to assume his duties or while returning to Louisville after completion of his assignment, his transportation could not have been regarded as a matter of charity or as a mere gratuity. We insist that this view should apply with equal force to trips made between the commencement and the completion of his duties in New Orleans.

The record does not reveal how long it was expected Mr. Holeman would be engaged in the performance of his duties but it is certain it was expected to continue for several months. It could not be reasonably argued that he was expected to remain in New Orleans continuously from the time his work began until it was completed. The responsibility of transporting Holeman to New Orleans and returning him to Louisville extended to normal trips incident to spending holidays at his home. Had the holidays been spent in New Orleans, L & N would have been required to pay his living expenses during the holiday periods. His return to Louisville at such times relieved the railroad company of its responsi-

bility to defray the expenses for the days he was in Louisville.

This case is not unlike Sassamin v. Penn. R. R. Co. 144 F. 2nd. 950, decided by the Court of Appeals for the Third Circuit. There the employee traveled daily between his home and work over the lines of his employer. The Court refused to recognize the waiver of liability on the employee's pass upon the theory that transportation between his home and place of employment was part of the compensation for his services or was an incident of his employment. He was, therefore, regarded as a passenger for hire.

Can a distinction reasonably be drawn between the Sassamin case where the employee traveled daily between his home and work and in the present case where, on account of distance, the trips between home and work were less frequent?

II

The Pass Issued to Mrs. Holeman

Petitioner insists that the fact that Mrs. Holeman paid half fare to the pullman company, a portion of which was received by the railroad company, makes her a passenger for hire. It is conceded that the railroad company in effect receives a part of each pullman fare. If the operations of the pullman company result in a profit, L & N receives a share of the profit. If the pullman company has an operating deficit, the railroad company is required to assume a part of the deficit. The half fare paid by Mrs. Holeman either increased the profit or reduced the operating deficit of the pullman company.

The question of Mrs. Holeman's status is not controlled by how much the railroad received out of the fare which she paid. If it received or was entitled to receive any sum or benefit as a result of her trip, she was a passenger for hire.

The Court of Appeals of Kentucky lightly brushes aside the status of Mrs. Holeman with this observation:

> "While Mr. Holeman was traveling on a pullman pass and Mrs. Holeman on a half rate pullman ticket at the time of the accident, from which half fare the railroad company may possibly have derived some profit, we do not consider that as establishing her as such paying passenger as to vitiate the no liability provison on her pass."

Does the Court intend to establish the rule that no passenger is a passenger for hire unless full fare is paid? If full fare is not required, where is the dividing line between a free passenger and a passenger for hire?

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of Kentucky to the end that the judgment of the Court of Appeals of Kentucky may be reviewed and reversed by this Court.

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COURT OF APPEALS OF KENTUCKY

— APPENDIX —

PEARL HOLEMAN, Administratrix of the Estate of FLOYD HOLEMAN, Deceased . . . . . *Appellant*

V.

LOUISVILLE & NASHVILLE RAILROAD CO., INC. . *Appellee*

and

PEARL HOLEMAN. . . . . *Appellant*

V.

LOUISVILLE & NASHVILLE RAILROAD CO., INC. . *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT

COMMON PLEAS BRANCH - FIRST AND THIRD DIVISIONS

Ben F. Ewing, Judge

OPINION OF THE COURT BY JUDGE MILLIKEN

AFFIRMING

The key question on this appeal is whether the carrier is absolved of liability for ordinary negligence by the provisions to that effect governing the acceptance of free passes by an employee and his wife.

Floyd Holeman, an employee of the Louisville & Nashville Railroad Company, died as a result of injuries received when L & N Train No. 98, the northbound Pan American, was derailed near Nashville, Tennessee, on July 3, 1954. His wife, Pearl Holeman, was injured in the same accident. Both Mr. and Mrs. Holeman were traveling from New Orleans to Louisville to visit their daughter on annual system passes, each of which provided: "The person accepting and

using it thereby assumes all risk of accident to person or property." Both the action to recover for Mr. Holeman's death and the action to recover for Mrs. Holeman's injuries were disposed of by directed verdicts for the Railroad and are consolidated on this appeal because controlled by the same law.

While Mr. Holeman was traveling on a Pullman pass and Mrs. Holeman on a half-rate Pullman ticket at the time of the accident, from which half-fare the Railroad may possibly have derived some profit, we do not consider that as establishing her as such a paying passenger as to vitiate the no liability proviso on her pass. The additional fact that the passes were not signed by the Holemans, as technically required for their acceptance, was disposed of in an analogous situation by Mr. Justice Holmes in Boering v. Chesapeake Beach Railway Company, 193 U. S. 442, 48 L. Ed. 742, 24 S. Ct. 515, when he wrote: "Accepting the privilege she was bound to know the condition thereof * * * the duty rests upon the one receiving the privileges to ascertain those conditions * * *."

We conclude that the circumstances of the present actions come clearly under the general rule reiterated in 1948, but not without a most persuasive dissenting opinion, by the Supreme Court in Francis v. Southern Pacific Company, 333 U. S. 445, 92 L. Ed. 798, where, after reviewing prior opinions on the subject and subsequent Congressional amendments to the governing statute, the Hepburn Act (49 U. S. C. A. 1 (7), the Court concluded that Congress had not wished to modify the Court's decisional law upholding the legality of the waiver of liability provision on employees' passes. Since the Federal law is controlling and our own decisional law is in accord therewith, Cincinnati, N. O. & T. P. Ry. Company v. Hansford, 305 Ky. 854, 205 S. W. 2d 346, we conclude that the trial court ruled properly in directing verdicts for the Railroad on the facts of the present cases.

because here the passes were customary gratuities to a faithful employee and his wife, and were not part of the consideration of employment, Francis v. Southern Pacific Company, above.

The judgments are affirmed.

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Supreme Court of the United States

October Term, 1958.

No.840

PEARL HOLEMAN, Administratrix of the Estate of Floyd Holeman, - *Petitioner,*

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Respondent.*

AND

PEARL HOLEMAN, - - - - - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

I. THE OPINION IN THE STATE COURT.

The Opinion of the Court of Appeals of Kentucky is reported in 319 S. W. 2d 47, and a copy of the Opinion has been attached to the Petition for A Writ of Certiorari.

II. JURISDICTION OF THE COURT.

Jurisdiction of the Court is invoked under the provisions of 28 *U. S. C. A.* 1257(3) since the question involved concerns the Hepburn Act, 49 *U. S. C. A.* 1(7) (see Appendix).

III. THE QUESTIONS PRESENTED FOR REVIEW.

A. Did the Court of Appeals of Kentucky, as well as the Trial Court, correctly follow the law as set forth in *Francis* v. *Southern Pacific Company*, 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611, to the effect that the provisions exempting the Railroad from liability for negligence upon gratuitous passes were enforceable.

B. Were the passes issued to Floyd Holeman and Pearl Holeman gratuitous passes within the meaning of the Hepburn Act, 49 *U. S. C. A.* 1(7), thereby making the provisions on the pass exempting the Railroad from liability for negligence enforceable.

IV. COUNTER-STATEMENT OF THE CASE.

With certain exceptions the statement of the case by the Petitioner is correct. However, we would like to point out several additions and corrections.

The passes issued to Mr. & Mrs. Floyd Holeman (Mrs. Holeman's Exhibit 3, Praytor Exhibit 1) contained the following language limiting liability for negligence:

> "This pass is not transferable, and is void if presented by any other than the person or persons

shown thereon or if any alteration, addition, or erasure is made on it.

"The person accepting and using it thereby assumes all risk of accident to person or property, states that he or she is not prohibited by law from receiving free transportation and agrees to make only such use of the pass as is permitted by federal and state laws."

Pass No. 47629 (1953-1954) was issued to "Floyd E. Holeman, Clerk, L. & N. R. R. Co.", in 1953 (T. R. 129). Pass No. 47630 (1953-1954) was issued to "Mrs. Floyd E. Holeman, Wife of Clerk, L. & N. R. R. Co." in 1953 (T. R. 89, 147). Both of these passes are annual passes and were issued prior to the time Mr. Holeman was assigned to New Orleans, Louisiana (T. R. 89, 147) in 1954. There is no evidence in this case that these passes were issued to Mr. & Mrs. Holeman in consideration of the assignment to New Orleans as set forth by the Petitioner on page 4.

Mr. Holeman presented these passes to the conductor and signed a Term Pass Signature Slip for transportation on these two passes for him and his wife (Praytor Exhibit 2).

Mr. Holeman was employed (T. R. 42) in New Orleans by the New Orleans Union Terminal Company. While so employed by them, complete control over his movements rested with the New Orleans Union Terminal Company (T. R. 176) and not with the Louisville and Nashville Railroad Company. The New Orleans Union Terminal Company had control

over the hours when he worked and what work he performed (T. R. 91). Mr. Holeman's seniority rights were protected by being retained on the payroll of the Louisville and Nashville Railroad Company (T. R. 92) while he was on loan to and employed by the New Orleans Union Terminal Company. This arrangement was made only to protect his seniority (T. E. 92). The Louisville and Nashville Railroad Company was reimbursed by the New Orleans Union Terminal Company for all of Mr. Holeman's salary and expenses (T. E. 89). While in New Orleans, Mr. Holeman rendered no service to the Louisville and Nashville Railroad Company (T. E. 92).

It is not true, as stated on page 4 of the Petitioner's Brief, that it was "understood" that Mr. Holeman would return to Louisville from time to time during his service to the Union Terminal. The testimony is exactly the opposite. Mr. Weber (T. E. 133), Holeman's co-worker, was asked by counsel if there was any understanding between him and the officials of the Company, who assigned him to New Orleans, that he would be permitted to travel back and forth between New Orleans and Louisville on occasional visits. Mr. Weber answered that there wasn't any kind of understanding at all, and there weren't any conversations about it. Mr. Weber (T. E. 170), when he returned to Louisville, would not go to the Home Office of the Louisville and Nashville Railroad Company because, "when I came to Louisville, I didn't even go around the office, because I had no connection."

The Petitioner has neglected to state the purpose of the Holemans' trip from New Orleans to Louisville on which the accident occurred. This was over (T. R. 177) a 4th of July weekend, and the office in New Orleans of the Union Terminal Company was to be closed for three days. The sole purpose of the trip from New Orleans to Louisville was personal and for pleasure. Mrs. Holeman testified (T. R. 50, 180) that the trip to Louisville was for the purpose of visiting her daughter in Louisville. No effort was made to control the off-time of Holeman by either the Union Terminal Company (T. R. 176) or the Louisville and Nashville Railroad Company (T. R. 77). Mr. & Mrs. Holeman maintained living quarters in New Orleans (T. R. 181).

An annual Pullman pass was requested for Mr. Holeman, but if such a pass had not been procured, the New Orleans Union Terminal Company would have paid for this service (T. R. 92). It is true that the management of the Railroad had established an overall policy concerning passes. But there is nothing in any labor contract, nor in any agreement, concerning the issuance of passes to employees. There is no obligation on the part of the Louisville and Nashville Railroad Company to issue a pass (T. R. 121-123). A pass may be withdrawn at any time nor need it be issued.

As to the Pullman Company, it is true there is (Burke Exhibit 1, T. R. 119) an agreement between the Pullman Company and the Railroad Company. However, while the Pullman Company was sued in

this case a summary judgment was given in favor of the Pullman Company (T. R. 35) and no appeal has been prosecuted against it. There is no proof that the Louisville and Nashville Railroad Company received any money from the Pullman Company under its contract, nor that it had to pay any less deficit because the only fare here paid was a one-half fare by Mrs. Holeman ($3.44; T. R. 88).

While Mrs. Holeman did not sign her pass, she was aware of the conditions of the pass, and she had traveled on this pass many times (T. R. 148). The Holemans did not use their pass in going to New Orleans when Mr. Holeman was first assigned there as they drove to New Orleans in their automobile (T. R. 148).

V. ARGUMENT.

A. The Petition for a Writ of Certiorari Should Be Denied Because the Court of Appeals of Kentucky Followed the Law as Set Forth by This Court in Francis v. Southern Pacific Company, 333 U. S. 445, 92 L. Ed. 798.

The Petition for a Writ of Certiorari should be denied because this case is governed by the decision in *Francis* v. *Southern Pacific Company,* 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611. The Court so states plainly in its Opinion (page 2a). Thus, under *Rule 19 of the Supreme Court Rules,* this petition should be denied because the Kentucky Court has followed the decisions of this Court.

B. Should Francis v. Southern Pacific Company, 333 U. S. 445, 92 L. Ed. 798, Remain in Effect.

It is respectfully submitted that this case is controlled by *Francis* v. *Southern Pacific Company*, 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611. The problem here involved was studied thoroughly by this Court, and the decision rendered in 1948. The *Francis* case, *supra*, is supported by numerous cases to the effect that the Federal law preempts the field on the question of liability under passes, and that there will be no liability if there is an excluding phrase in the free pass for damages from ordinary negligence. *Northern Pacific Railway Company* v. *Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering* v. *Chesapeake Beach R. Company*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Railway Company* v. *Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern R. Company* v. *Van Zant*, 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348.

The provision for the exemption from liability for negligence has been applied in other jurisdictions to a member of an employee's family who has a gratuitous pass. *Ketchum* v. *Denver & Rio Grande Western R. Company*, 175 F. 2d 69, 71 (C. A. 10th); *Donnelly* v. *Southern Pac. Company*, 18 Cal. 2d 863, 118 P. 2d 465, 468; *Louisville & N. R. Company* v. *George*, 279 Ky. 24, 129 S. W. 2d 986, 987; *Pinnell* v. *St. Louis-San Francisco R. Company*, 263 S. W. 182, 185 (Mo.); *Plant* v. *Thompson*, 359 Mo. 391, 221 S. W. 2d 834, 835; *Wilder* v. *Pennsylvania R. Company*, 245 N. Y. 36,

156 N. E. 88; *Spanable* v. *New York Cent. R. Company*, 69 N. E. 2d 441 also 70 N. E. 2d 233 (Ohio); *Atchison, T. & S. F. R. Company* v. *Smith*, 39 Okla. 157, 132 P. 494; *O'Brien* v. *Atlantic Coast Line*, 99 Fla. 843, 128 So. 9.

Recovery has also been denied when the employee has been the recipient of the pass and has been injured or killed. *Francis* v. *Southern Pacific Company, supra*; *Kansas City Southern R. Company* v. *Van Zant*, 260 U. S. 459, 467, 67 L. Ed. 348, 350, 43 S. Ct. 176, reversing 289 Mo. 163, 232 S. W. 696; *Smith* v. *Atchison, T. & S. F. R. Company*, 194 F. 79 (C. A. 8th); *Bergerson* v. *Great Northern R. Company*, 158 Minn. 20, 196 N. W. 670, 671; *Williamson* v. *Seaboard Air Line R. Company*, 136 Va. 626, 118 S. E. 255, 256; *Atlantic Greyhound Lines* v. *Skinner*, 172 Va. 428, 2 S. E. 2d 441; *Wright* v. *Central of Georgia Ry. Company*, 18 Ga. App. 290, 89 S. E. 457; *Ft. Wayne & Wabash Valley Traction Company* v. *Justus*, 186 Ind. 464, 115 N. E. 585, 587. Compare *Louisville & N. R. Company* v. *Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297 reversing 133 Ky. 652, 118 S. W. 982.

The Court of Appeals of Kentucky has followed the decisions of the Supreme Court in its Opinion in this case and as noted in *Louisville & N. R. Company* v. *George*, 279 Ky. 24, 129 S. W. 2d 986, 987, the question before a State Court concerning exemption from liability under the provisions of free passes will be determined under the decisions of the Supreme Court of the United States. The parties here involved were traveling from New Orleans, Louisiana, to Louisville,

Kentucky, and thus, were engaged in interstate travel. Therefore, since the passes were free, under the Kentucky case of *Cincinnati, N. O. & T. P. Ry. Company* v. *Hansford,* 305 Ky. 854, 205 S. W. 2d 346, 347, the matter was to be determined under the Hepburn Act, 49 *U. S. C. A.* 1(7), and this became a matter of Federal law under which the Kentucky Court was bound by the holding in *Francis* v. *Southern Pacific Company supra,* by this Court.

It is respectfully submitted that the review of the legislative history of the Hepburn Act contained in the majority opinion of *Francis* v. *Southern Pacific Company, supra,* in the light of the previous decisions of the Court adequately sustained the position of the Court. No step has been taken by Congress in any way to amend the Hepburn Act in order to overrule the holding in *Francis* v. *Southern Pacific Company, supra.* Therefore, both on the reason as stated in the Opinion, and upon the fact that Congress has not acted contrary to the case, *Francis* v. *Southern Pacific Company, supra,* should remain in full force and effect.

C. The Passes Involved in the Present Case Under the Provisions of the Hepburn Act, 49 U. S. C. A. 1(7), Were Gratuitous Passes.

The Petitioner has argued that the passes involved were not gratuitous passes, but that they were issued as a result of long service, and, therefore, were part of the compensation of the employee. These passes were issued in 1953 (T. R. 147) before it was contemplated sending Holeman to New Orleans. The argument here

presented was made in the *Francis* v. *Southern Pacific Company,* 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611, as shown by the dissenting opinion in 333 U. S. 445, 467-469, 68 S. Ct. 611, 621-622. But this argument was rejected by the majority of the Supreme Court, and it was specifically held the pass was a "free" one and a gratuity, even though issued to an employee because he was such an employee. 333 U. S. 445, 449, 68 S. Ct. 611, 613. The same argument, as is made here by the Petitioner was rejected by the Supreme Court in the *Francis* case, *supra,* in view of the failure of Congress to make any change in the Act after its decision in *Northern Pacific Railway Company* v. *Adams,* 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering* v. *Chesapeake Beach R. Company,* 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Railway Company* v. *Thompson,* 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern R. Company* v. *Van Zant,* 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348. Thus, clearly under the decisions of this Court the passes issued here to Mr. & Mrs. Holeman were "free passes" and a gratuity for under 49 *U. S. C. A.* 1(7) only free passes can be issued to "its employees and their families" without criminal penalty.

The arguments made in Petitioner's petition were before the Supreme Court in *Francis* v. *Southern Pacific Company, supra,* as illustrated in a dissenting opinion. However, these arguments were rejected. The rule in the *Francis* case, *supra,* is that where an employee of a common carrier was riding on a free pass,

and the free pass provided that the user assumed all risk of injury to his person whether by negligence or otherwise, the carrier would not be liable to the holder of the pass for damages caused by ordinary negligence and has the same defense against the passenger's heirs in an action from wrongful death of the passenger.

This Court specifically pointed out at 333 U. S. 445, 447, 68 S. Ct. 611, 612, that the employee and his wife were riding on a free pass on a personal trip. The Tenth Circuit in its opinion in this case entitled *Francis* v. *Southern Pacific Company,* 162 F. 2d 813, 815-816, pointed out that Francis was an employee of the Southern Pacific Company and because of being such employee, he and his wife were issued free passes. At page 815 it is also noted that Francis and his wife were also in a Pullman car occupying a berth.

The *Francis* case, *supra,* is identical to the present case. The purpose of the trip to Louisville, Kentucky, was to visit their daughter on the 4th of July. The trip was a personal one, and had no connection with Railroad business. These term passes had been granted and could be accepted or rejected by the employee. They were not part of the consideration of his employment for there is no labor contract involved, and Petitioner's argument was specifically rejected by the Supreme Court in the *Francis* case, *supra,* because it was stated:

> "Thereafter in 1914 the Court held that the rule of the Adams case was applicable under the Federal Statute and that the 'free pass' was none-

theless a gratuity though issued to an employee of the carrier."

In support of this the Supreme Court cited *Charleston & Western Carolina Railway Company* v. *Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476. The effect of the *Thompson* case is clearly shown when the State Court decision, which the Supreme Court reversed, is examined for the State Court in its opinion decided the case for the plaintiff based on the same argument that is made here in *Charleston & W. C. Ry. Company* v. *Thompson*, 13 Ga. App. 528, 80 S. E. 1097, 1101, on the ground that the issuing of such passes *was considered to be part of the compensation* of the employee. But the Supreme Court reversed in the above cited case and held that the pass was not such compensation. In *Wright* v. *Central of Georgia Ry. Company*, 18 Ga. App. 290, 89 S. E. 457, 458, the annual pass issued to an employee of long service was held "gratuitous", and the limitation of liability held valid based on the *Thompson* case from the Supreme Court. Thus, the "consideration" argument has been consistently refuted. See *Dunn* v. *Alton R. Company*, 88 S. W. 2d 224, 231 (Mo.); *Atlantic Greyhound Lines* v. *Skinner*, 172 Va. 428, 2 S. E. 2d 441. It is also to be noted that in the *Francis* case the decedents were a man and wife, the husband an employee of the Railroad just as we have here. *Francis* v. *Southern Pacific Company, supra*, was decided in 1948. It is respectfully submitted that this opinion overrules in principal *Sassaman* v. *Pennsylvania R. Company*, 144 F. 2d 950, which was decided in 1944.

In addition, the *Sassaman* v. *Pennsylvania R. Company* case, *supra,* is not applicable in that it did not involve interstate transportation. The Kentucky Court of Appeals in *Cincinnati, N. O. & T. P. Ry. Company* v. *Hansford,* 305 Ky. 854, 205 S. W. 2d 346, has ruled on most of the issues here presented concerning the effect of whether or not the pass is gratuitous. On page 347, that Court distinguished the *Sassaman* case, *supra,* correctly and that distinction applies here. The Kentucky Court stated:

> "The Court there distinguished a case of that nature from a case where the employee is traveling for his own *personal pleasure or other personal* reasons."

The Kentucky Court further stated at page 347:

> "It does not follow because the appellee was traveling to his home that he was not taking the trip for his own personal pleasure or other personal reasons. He was certainly not commuting from Stearns to Mt. Carmel to perform his work each day."

The same is certainly the situation here in any light that is placed on the facts. Mr. Holeman had not been ordered to take this trip by either the New Orleans Union Terminal Company or the Louisville and Nashville Railroad Company. He was coming to Louisville solely for the purpose of seeing his daughter. This is certainly a personal reason. He was not commuting back and forth to New Orleans. He and his wife had living quarters in New Orleans, and they originally drove there by automobile.

Other Courts have held that such annual passes or term passes, as are involved here, are "free transportation within the provisions of the Hepburn Act, and the exemption of liability may be properly made." *Wright* v. *Central of Georgia Ry. Company,* 18 Ga. App. 290, 89 S. E. 457. Such a pass, even though issued as a result of long service, is a convenience to the employee, and the Court of Appeals of Georgia held such a pass was undoubtedly gratuitous. Compare *Turek* v. *Pennsylvania R. Company,* 361 Pa. 512, 64 A. 2d 779, 781 (annual pass). To the same effect no recovery was allowed to a wife of an employee who had been issued an annual pass. *Ketchum* v. *Denver & Rio Grande Western R. Company,* 175 F. 2d 69 (C. A. 10th). In the present case the issuance of these passes could not have been an inducement to take the job in New Orleans for the passes here involved were issued long before Mr. Holeman was approached for that job. Secondly, he and his wife drove by automobile to New Orleans (T. R. 148), and the issuance or non-issuance of the pass had nothing to do with his arriving at New Orleans to perform his function for the New Orleans Union Terminal Company.

Petitioner's reliance upon *Martin* v. *Greyhound Corporation,* 227 F. 2d 501 (C. A. 6th), is misplaced because that case is not controlling here. There the employee was traveling on a pass to which he was entitled, not as a matter of grace, but under the terms of a written contract between his union and his employer for his benefit. The question of willful and wanton negligence was also involved. The Court of

Appeals for the Sixth Circuit pointed out at page 503 in the *Martin* case, *supra,* that the fact situation was different from that of *Charleston & Western Carolina Railway Company* v. *Thompson,* 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476. This Court had specifically stated in the *Thompson* case, *supra,* that there was no obligation on the Railroad to issue the pass. Therefore, the liability limiting provisions of the pass were enforceable. In the *Martin* case there was a contractual relationship, and an obligation on the part of the carrier through the union contract to issue the pass. Thus, on the very grounds stated in the *Martin* case the rule to be applied here is that of *Charleston & Western Carolina Railway Company* v. *Thompson, supra,* and not the rule in *Martin* v. *Greyhound Corporation, supra.*

In addition, the *Martin* case, *supra,* does not address itself to the question of whether, in view of the Hepburn Act, a pass issued to an employee or a member of his family as a result of a specific provision in a contract of employment is valid. There is authority to the contrary in *Dunn* v. *Alton R. Company,* 88 S. W. 2d 224, 231 (Mo.); *Payne* v. *Elliott,* 77 Ind. App. 415, 133 N. E. 751, 752. See *Louisville & N. R. Company* v. *Mottley,* 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297 reversing 133 Ky. 652, 118 S. W. 982, where a contract for annual pass for life in settlement of claim for damages was held illegal as *contra* to the Hepburn Act. Therefore, since there was no valid consideration, such a pass must be "free".

New York Cent. R. Company v. *Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627 (1873), is not applicable for as pointed out at page 633 the drover had cattle on the train, and he was required, although he paid a fare for the transportation of the cattle and himself, to sign an agreement to "attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, or whoever went with the cattle; and received what is called a drover's pass, certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the trail". The agreement stated this was done in consideration of carrying the cattle at less than tariff rates, but at the trial it was shown that the rate involved was three times the normal rate. Thus, the case is actually one of a fare paying passenger agreeing to a limitation of liability. It is true the Court held the limitation could not be enforced, but this is a case of fare paying passenger being forced into a limitation of liability agreement which is against public policy. The case was so treated by the Supreme Court, and certainly, is not applicable here. This is clearly shown by the fact that the Kentucky Court did not hold it applicable in *Louisville & N. R. Company* v. *George*, 279 Ky. 24, 129 S. W. 2d 986, 988, when the same factual situation was present as here.

Grand Trunk Railway v. *Stevens*, 95 U. S. 655, 24 L. Ed. 535, is not applicable because plaintiff was a passenger for hire. Plaintiff, not an employee of

the Railroad, was requested to go to Montreal to see the superintendent of the car department about the plaintiff's car coupling which he desired to sell to the railroad. The railroad offered to pay all his expenses to which plaintiff agreed. Pursuant to this agreement the pass was issued. The Supreme Court held plaintiff a passenger for hire because "His expenses in making the journey were to be paid by the defendant, and of these the expense of his transportation was a part". Here a contract was made with a stranger, and it was the same as if the railroad had given him the money to buy a ticket. Thus, the pass was issued in consideration of services. Secondly, plaintiff was on a trip on the railroad's business, and not one for his own personal pleasure as here. Also, as pointed out in *Charleston & Western Carolina Railway Company* v. *Thompson*, 234 U. S. 576, 58 L. Ed. 1476, 1479, the question is whether the pass is "free" under the Hepburn Act. Such passes as are here involved that are issued to employees on an equal basis are "free", and not issued in consideration of services.

Norfolk Southern R. Company v. *Chatman*, 244 U. S. 276, 61 L. Ed. 1131, is not applicable for a drover who was accompanying horses was involved, and the drover was held to be a passenger for hire to whom the limitation of liability was void. However, the Supreme Court on page 284 (1136) was careful to reaffirm *Charleston & Western Carolina Railway Company* v. *Thompson, supra*, pointing out that there a gratuitous pass was involved, issued without consideration, to a member of a family of an employee. Thus, the

situation here involved is expressly pointed out as different from the rule in that case.

It is clearly set forth in the evidence that there was no obligation on the part of the Railroad to issue these passes. The employee was entitled to the pass as a matter of grace, and it is crystal clear that the employee could not have compelled the carrier to issue him a pass by a legal proceeding if the carrier had refused to issue it. Thus, the pass was a "free" or "gratuitous" pass and the *Francis* v. *Southern Pacific Company* case, *supra,* is applicable as the Court of Appeals of Kentucky found in its opinion.

D. The Pass Issued to Mrs. Holeman Was a Gratuitous Pass.

Mrs. Holeman did not work for the Louisville and Nashville Railroad Company, and she received a pass upon the Railroad due to the fact that she was the wife of an employee. Again, *Francis* v. *Southern Pacific Company,* 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611, holds that such a pass is a gratuitous pass. Mrs. Holeman paid one-half fare for Pullman space. She paid no consideration at all to the Louisville and Nashville Railroad Company. The only case where a similar contention has been made is *Ulrich* v. *New York C. & H. R. Company,* 108 N. Y. 80, 15 N. E. 60, which holds specifically contrary to the present contention that the purchase of a Pullman seat makes one traveling on a pass a passenger for hire as far as the Railroad is concerned. As pointed out in the *Ulrich* opinion, the

money is actually paid to the Pullman Company for the space and not to the Railroad. Certainly, there is nothing inconsistent between free passage being furnished by the Louisville and Nashville Railroad Company and the payment for specific space to the Pullman Company. As stated in the *Ulrich* case, *supra*, at page 62:

> "The passenger could not have supposed that it did, for he not only used his pass for that purpose, but from the insignificance of the price paid for his seat, as compared with the regular fare for such a trip, the idea is repelled that he supposed he was thereby securing transportation also."

Here, the value of the Pullman ticket was $3.44 (T. R. 88). Certainly, there was no payment for transportation in any way. It is respectfully submitted that the agreement between the Louisville and Nashville Railroad Company and the Pullman Company concerning the operation of Pullman cars over its lines and inducing the Pullman Company to furnish such cars by making some agreement concerning possible losses suffered by the Pullman Company from such operation does not make Mrs. Holeman a paying passenger so as to vitiate the no liability provisions of her pass. The Pullman Company received the primary benefit of the half fare and, in addition, this sum was not paid for travel over the Railroad, but was paid merely for space. As noted in the syllabus to the *Ulrich* case, *supra*, the fact that a passenger traveling on a free pass was riding in a drawing room car for which he had

bought a ticket at the time he was injured, does not affect the immunity from liability for negligence secured to the Railroad by the provisions of the pass.

VI. CONCLUSION.

It is respectfully submitted that the law concerning gratuitous passes has been well settled by *Francis* v. *Southern Pacific Company*, 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611. The Petitioner has been unable to find any cases in which the decision of the Court of Appeals of Kentucky, in this case conflicts. It is respectfully submitted that for this reason and the reasons stated above the Petition for a Writ of Certiorari to the Court of Appeals of Kentucky should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for Louisville and Nashville Railroad Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on May ——, 1959, I served a copy of the foregoing Response to the Petition for A Writ of Certiorari on the Petitioners, Pearl Holeman and Pearl Holeman, Administratrix of the Estate of Floyd Holeman, by that day depositing a copy thereof in a United States Post Office in a duly addressed envelope, with first class postage thereon prepaid, addressed to her counsel of record, Parker W. Duncan, at 1032 College Street, Bowling Green, Kentucky.

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APPENDIX.

49 U. S. C. A. 1(7):

§ 1, par. (7). *Free transportation for passengers prohibited; exceptions; penalty.* No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit

the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41-43 of this title. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; Apr. 13, 1908, c. 143, 35 Stat. 60; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 401, 41 Stat. 475; Aug. 9, 1935, c. 498, § 7, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 3 (a), (b), 54 Stat. 900; June 24, 1948, c. 622, 62 Stat. 602; June 27, 1952, c. 477, Title IV, § 402 (g), 66 Stat. 277.